

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

DEC 20 1994

WILLIAM B. GUTHRIE
Clerk, U. S. District Court

Deputy Clerk

MARY E. FENNELL,

PLAINTIFF,

VS.

DONNA E. SHALALA, Secretary
of Health and Human Services

DEFENDANT.

CASE NO. CIV-94-048-S

FINDINGS AND RECOMMENDATIONS

SCOPE OF COURT REVIEW - Court review is limited to consider-

ation of the pleadings and transcript filed by the Secretary as required by 42 USC 405(g). The Court is obligated to determine whether there is substantial evidence in the record to support the Secretary's decision. Weakley v. Heckler, 795 F.2d 64 (10th Cir. 1986); Cage v. Califano, 638 F.2d 219 (10th Cir. 1981); Tillery v. Schweiker, 712 F.2d 601 (10th Cir. 1983). Substantial evidence is more than a scintilla, but less than a preponderance; it is such evidence that a reasonable mind might accept to support the conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971). The Court, in this review, has the power to affirm, modify or reverse the Secretary's decision with or without remand for a rehearing.

NATURE OF APPEAL - Court review of denial of claim for disability under Article 2. Plaintiff is insured through 9-30-90. Therefore, Plaintiff must prove that she was disabled on or before 9-30-90.

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CHRONOLOGY OF CASE

1. 7-13-87 Plaintiff's initial Application for Disability (Tr. 68-71)
2. 8-19-92 Administrative Denial of Plaintiff's Claim (Tr. 74-76)
3. 8-19-92 Denial of Application for Reconsideration on Disability (Tr. 74-76)
4. 10-22-92 Denial of Application for Reconsideration on SSI (Tr. 79-81)
5. 4-12-93 Hearing Before Administrative Law Judge (Tr. 26-67)
6. 5-20-93 Unfavorable Decision by Administrative Law Judge (Tr. 10-20)
7. 11-19-93 Order of Appeals Council Denying Review (Tr. 3-4)
8. Complaint filed with this Court 1-21-94

DISCUSSION AND ANALYSIS - Plaintiff, Mary E. Fennell, SSN 498-48-0701, was born on 7-14-44 and had obtained a 5th grade education (Tr. 68-71). Plaintiff in her Vocational Report of 6-30-92 (Tr. 87-96) in her past job history had done private nursing care; been a sanitation worker with the City of Tulsa; manufacturing worker making floor mats; glass manufacturing company; packing company and had worked at a nursing home and that some of these jobs entailed lifting from 20 to over 100 pounds. Plaintiff alleged she was injured on or about 7-13-87 as a result of lifting a nursing care patient and had bad back with several surgeries, neck disc herniation, muscle spasms and suffered debilitating pain which

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caused her to be disabled (Tr. 97-104).

At the administrative hearing of 4-12-93 before Administrative Law Judge James D. Jordan in Muskogee, Oklahoma, the testimony of Plaintiff indicated she was 5'7" and weighed 230 pounds. Her primary area of complaint was severe pain and back, arms and shoulders as well as her neck. Plaintiff used a crutch to help her walk.

As to her activities, Plaintiff indicated that she had driven to the hearing that date and did drive and had been on trips with her husband including one to San Antonio; she had had two surgeries in Tulsa in 1990 on discs in her neck and that she visited at her sister's as well as her nephews, did grocery shopping and went to church irregularly and accompanied her husband on fishing trips occasionally. She further indicated she helped make the bed, folded clothes, washes dishes and did some sewing and crocheting.

The medical evidence in this case shows that Plaintiff was examined by Dr. Sabrina Prewett on 11-28-87 and found Plaintiff to have some palpable pain in the gluteal areas and over the sacral areas. Distal neurovascular function was found to be grossly intact and Babinski tests were negative bilaterally. Dr. Prewett found Plaintiff's Achilles tendon reflex to be equal bilaterally and Plaintiff was discharged with a prescription for Flexeril and Motrin with instructions to use warm moist heat (Tr. 128-130). Dr. G. Bruce Carrico's

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examination of Plaintiff on 4-18-90 shows diffuse muscular tenderness of the spine and her motor and sensory functions were also normal and Plaintiff was given the same medication and advised to use same treatment as preceding physician prescribed in 1987 (Tr. 139).

Dr. John Vosburgh, in May of 1990, found Plaintiff to full range of motion of her neck, lower back and left shoulder and a subsequent mylogram showed she had a herniated disc in her back and a protruded disc in her neck (Tr. 148-149). The Plaintiff's primary treating physician, Dr. David Hicks, first examined Plaintiff on 7-2-90 and subsequent surgery for correction purposes was performed. She was found to be doing well post-operatively (Tr. 169). A review of Dr. Hicks' patient notes covering the period from 7-2-90 through 7-13-92 recommended she undergo job re-training and rehabilitation which indicates a belief she is able to return to work (Tr. 181). The Court notes that for more than a two and one-half year period Plaintiff received no medical treatment for any neck, back or pain complaints and there is nothing in the medical record to show that any physician had ever determined Plaintiff's condition prior to 9-30-90 was so severe as to keep her from being gainfully employed. The Administrative Law Judge (ALJ) applied the five step sequential evaluation process as set forth by 20 C.F.R. Sec. 404.1520, 416.920 and found the Plaintiff had not been

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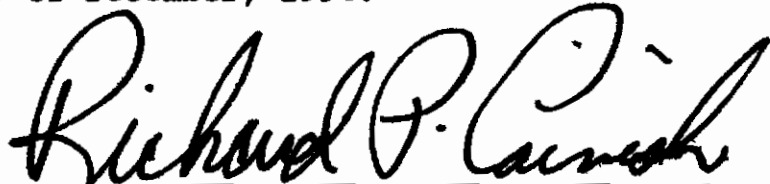
engaged in any gainful activity since the date of her alleged injury on 7-13-87, found she had a severe impairment as to Step 2, found that Plaintiff did not have a listed impairment as to Step 3 and at Step 4 found Plaintiff could perform her past work as a machine tender as well as related other work as testified to by the Vocational Expert and was therefore not disabled. The ALJ fully developed Plaintiff's allegations of pain in accordance with the guidelines as set forth in Luna v. Bowen, 834 F.2d 161, 165 (10th Cir. 1987) including Plaintiff's daily activities which included walking, driving, church attendance, visiting relatives, sewing and occasional fishing as well as certain household activities. The ALJ further noted that Plaintiff did use a crutch to help her walk although the transcript shows there being no prescription for such usage. Plaintiff has the burden in establishing her claim based upon disabling pain and without explicit confirmation of treating physician which is not contained herein, may be difficult. Nonetheless the Plaintiff is entitled to have his non-medical objective and subjective testimony of pain evaluated by the ALJ and weighed along side the medical evidence Hutson v. Bowen, 838 F.2d 1125, 1131 (10th Cir. 1988). The ALJ, in determining Plaintiff's evidence as to pain, shall consider medical evidence, Plaintiff's responses to questions regarding daily activities, appearance and demeanor at hearing and determine credibility

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where there is a discrepancy between Plaintiff's testimony at hearing as to daily routine as between that set forth in Plaintiff's application Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495, 1499 (10th Cir. 1992). In this case, the ALJ found Plaintiff's testimony to not be credible and overstated. Credibility is within the province of the ALJ who shall determine credibility based on the evidence as a whole Hamilton v. Secretary of Health & Human Services, No. 91-3160, 1992 WL 76501 * 3 (10th Cir. April 17, 1992); Gatson v. Bowen, 838 F.2d 442, 447 (10th Cir.) CONCLUSION - Therefore, the Magistrate Judge finds there is substantial evidence to support the Secretary's finding that Plaintiff is not disabled within the meaning of the Social Security Act. 42 U.S.C. Sec. 423(d)(5). Accordingly, it is recommended that the Decision of the ALJ, which is the final decision of the Secretary, should be affirmed. Parties are herewith given 10 days from the date of this service to file with the Clerk of the Court any objections, with support brief. Failure to object to the Findings and Recommendation within ten (10) days will preclude appellate review of the judgment of the district court based on such findings. 28 U.S.C. Sec. 636(b)(1), Federal Rules of Civil Procedure 72, 6(a) and 6(3), and Local Rule 32(d).

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DATED this 20th day of December, 1994.



RICHARD P. CORNISH
UNITED STATES MAGISTRATE JUDGE